84-676

Case No. _____

UNITED STATES SUPREME COURT
1984 TERM

FRANK E. BARNETT,

Petitioner,

v.

UNITED AIR LINES, INC. and
ASSOCIATION OF FLIGHT ATTENDANTS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, if DelCostello v. Int'l Bro. of Teamsters, ___ U.S. ___, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), requires application of the limitation in 29 U.S.C. § 160(b) to an action under the Railway Labor Act (R.L.A.), 45 U.S.C. § 151, et seq., it should apply retroactively in view of 45 U.S.C. § 153 First (r) and Colo. Rev. Stat. § 13-80-106?

2. Whether, under DelCostello, an action alleging violation of the duty of fair representation in connection with a Board of Adjustment (Board) decision under Title II of the R.L.A., 45 U.S.C. § 181, et seq., is governed by the statute of limitations for actions relating to Board decisions under Title I of that Act, 45 U.S.C. § 153 First (r), or, instead, by the limitation for administrative charges of unfair labor

practices before the National Labor Relations Board, 29 U.S.C. § 160(b)?

3. Whether this action was timely under 45 U.S.C. § 153 First (r), and, specifically, when the action "accrued?"

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

FRANK E. BARNETT

Petitioner,

v.

UNITED AIR LINES, INC. and
ASSOCIATION OF FLIGHT ATTENDANTS,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Frank E. Barnett petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

REPORTS OF THE DECISIONS BELOW[1]

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[1] All parties are listed in the caption.

The first opinion of the Tenth Circuit Court of Appeals was reported at Barnett v. United Air Lines, Inc., 729 F.2d 693 (10th Cir. 1984), and appears at Appendix (App.) pp. 20-38.[2] The second opinion, granting plaintiff's petition for rehearing, withdrawing the first opinion, and vacating the judgment entered on the first is reported at Barnett v. United Air Lines, Inc., 738 F.2d 358 (10th Cir. 1984), and appears at App. 39-59.

JURISDICTION

The judgment of the Tenth Circuit entered June 21, 1984. A timely petition for rehearing was denied July 10, 1984. App. 60. This court has jurisdiction under 28 U.S.C. § 1254(1).

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[2] Due to its length the appendix is under separate cover.

STATUTES

45 U.S.C. § 153 First (r) provides: "All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after."

45 U.S.C. § 181 provides:

> All the provisions of Title I of this Act [45 U.S.C. § 151-163], except the provisions of section 3 thereof [45 U.S.C. § 153], are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

Due to length 45 U.S.C. § 184 is set out verbatim in the appendix. App. 1-3. The most pertitent passage reads:

> It shall be the duty of every carrier and of its employees, acting through their representatives ... to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group or regional boards of adjustment, under the authority of section 3, Title I of this act [45 U.S.C. § 153].
>
> Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air of its or their employees; or pending the establishement of a permanent National Board of Adjustment as hereinafter provided. ...

Due to its length, 29 U.S.C. § 160(b) is set out verbatim in the

appendix. App. 4-6. The pertinent portion reads:

> Whenever it is charged that any person has engaged in or is engaging in any ... unfair labor practice [under 29 U.S.C. § 158], the [National Labor Relations] Board ... shall have power to issue ... a complaint ... Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made...

Colo. Rev. Stat. § 13-80-106 reads:

> All actions upon a liability created by a federal statute, other than for a forfeiture or penalty[,] for which actions no period of limitations is provided in such statute, shall be commenced within two years or the period specified for comparable actions arising under Colorado law, whichever is longer, after the cause of action accrues.

STATEMENT OF THE CASE

I. JURISDICTION BELOW

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1337.

II. FACTS AND PROCEEDINGS BELOW

Plaintiff Frank Barnett's (Barnett) Amended Complaint was dismissed on United Airline's (United) Motion to Dismiss and the Association of Flight Attendants' (AFA) Motion for Summary Judgment. App. 7-8. Both motions were based on statutes of limitations.

Plaintiff's Amended Complaint alleged breach of a collective bargaining agreement between the defendants and breach of the duty of fair representation in a Board of Adjustment (Board) proceeding conducted under the auspices of 45 U.S.C. § 184 -- i.e., the Title of the R.L.A. devoted to the airlines industry. App. 23-24. The Board decision alleged to be tainted by

the lack of fair representation was rendered September 7, 1978, but Barnett's first notice of the decision was a letter dated October 13, 1978, received several days later. App. 23. Barnett's complaint was filed October 14, 1980. App. 23.

United urged application of 45 U.S.C. § 153 First (r) to Barnett's action, while AFA advocated application of Colo. Rev. Stat. § 22-214(2). Barnett argued that his action was timely under either Colo. Rev. Stat. § 13-80-106 or 45 U.S.C. § 153 First (r). The district court, relying on United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981),[3] selected a state

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[3] United Parcel Service v. Mitchell was decided over one year after Barnett's complaint was filed. DelCostello v. Teamsters, infra, was decided after briefing in this case was complete in the Court of Appeals.

limitation and dismissed the action as outside the limitation for applications to vacate arbitration awards under the Uniform Aribtration Act, Colo. Rev. Stat. § 13-22-214(2). App. 24. Colo. Rev. Stat. § 13-80-106 was found inapplicable on the grounds that Barnett's action was not on a liability "created by a federal statute." App. 14-15.[4]

The Court of Appeals first determined that a federal limitation should be borrowed to govern this action, and determined to apply 45

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[4] Contra, e.g., I.B.E.W. v. Foust, 442 U.S. 42, 46 (1979) ("statutory duty of fair representation ... imposed" by Congress); Vaca v. Sipes, 386 U.S. 171, 177 (1976) (fair representation is a "duty grounded in federal statutes"); Steele v. Louisville & Nashville Ry., 323 U.S. 192 (1944) ("We hold the language of the act ... expresses the aim of Congress to impose" duty of fair representation).

U.S.C. § 153 First (r) -- the statute governing any court action in relation to board of adjustment decisions under the original R.L.A. This decision came after DelCostello v. Int'l Bro. of Teamsters, supra, was decided, and brought to the notice of the court. Though 45 U.S.C. § 153 First (r) allows two years from "accrual" of the cause of action, the Court of Appeals found Barnett's action had accrued when the decision was rendered, and before Barnett had any notice of it, on September 7, 1978. It therefore found Barnett's complaint untimely by approximately five weeks. App. 33-36.

Barnett petitioned for rehearing, and argued that the Court's construction of an "accrual" limitation was incorrect. See, pp. 24-27, infra. The Court granted the petition and, relying

on DelCostello, changed the federal limitation it "borrowed" to the limitation for filing administrative charges of unfair labor practices under the N.L.R.A., 28 U.S.C. § 160(b).

Barnett again petitioned for rehearing and disputed, inter alia, the retroactive application of 29 U.S.C. § 160(b) to this action.

ARGUMENT

I. THE RETROACTIVITY OF DELCOSTELLO AND 29 U.S.C. § 160(B) IS THE SUBJECT OF A SPLIT IN THE CIRCUITS

The Courts of Appeals for the Third, Fourth, Fifth, Seventh, Eight, and Eleventh Circuits have determined to apply DelCostello and 29 U.S.C. § 160(b)

retroactively.[5] The Tenth Circuit decision in this case applies DelCostello and 29 U.S.C. § 160(b) retroactively without discussion.

The Court of Appeals for the Ninth Circuit has found retroactive application of DelCostello improper. See, e.g., Barina v. Gulf-Trading & Transp. Co., 726 F.2d 560 (9th Cir. 1984); McNaughton v. Dillingham Corp., 722 F.2d 1459 (9th Cir. 1983); Edwards v. Teamsters Local Union No. 36, 719 F.2d 1036 (9th Cir. 1983). Some of these individual

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[5] See, e.g., Lincoln v Dist. 9 of Int'l Ass'n of Machinists, 723 F.2d 627 (8th Cir. 1983); Murray v Branch Motor Express Co., 723 F.2d 1146 (4th Cir. 1983); Edwards v Sea-Land Service, 720 F.2d 857 (5th Cir. 1983); Rogers v Lockheed-Georgia Co., 720 F.2d 1247 (11th Cir. 1983); Perez v Dana Corp., 718 F.2d 581 (3rd Cir. 1983); Storck v. Int'l Bro. of Teamsters, 712 F.2d 1194 (7th Cir. 1983).

decisions could be reconciled, but the apparently per se rule of nonretroactivity in the Ninth Circuit and the apparently per se rule of retroactivity in at least some of the other circuits cannot be.

The criteria of Chevron Oil v. Hudson, 404 U.S. 97 (1971), govern the issue of retroactivity. The conflict concerns interpretation and application of these criteria.

The first criterion is that the decision "must establish a new principle of law ... by overruling clear past precedent ... or by deciding an issue ... not clearly foreshadowed." 404 U.S. at 106. Most courts have found DelCostello did not intrude on clearly established law. The Ninth Circuit, in Edwards v. Teamsters, supra, found that prior law clearly established the

principle of borrowing state limitations,[6] and that a California statute for "liability created by statute" clearly governed. Here, the state statute applies to "liability created by a federal statute," and was even more clearly a proper source for Barnett's reliance. See, n. 3, supra.

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[6] That state limitations were controlling was clear when this action was filed. See, e.g., Runyon v. McCrary, 427 U.S. 160 (1976); Johnson v Railway Express, 421 U.S. 454 (1975); Auto Workers v. Hoosier Cardinal, 383 U.S. 696 (1966); O'Sullivan v. Felix, 233 U.S. 318 (1914); Chattanooga Foundry v. Atlanta, 203 U.S. 390 (1906); McClaine v. Rankin, 197 U.S. 154 (1905); Campbell v. Haverhill, 155 U.S. 610 (1895); McCluny v. Silliman, 28 U.S. (3 Pet.) 270, 277 (1830). The only contrary indications were clearly distinguishable. Occidental Life Ins. Co. v E.E.O.C., 432 U.S. 355 (1977) (no limitation proper); McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958) (admiralty action); Holmberg v. Armbrecht, 327 U.S. 392 (1946) (no limitation proper).

The unpredictability of DelCostello is particularly clear in a case under the R.L.A. Indeed, no party to this action in motion or brief filed before DelCostello even suggested 29 U.S.C. § 160(b) applied. As noted above, when United argued that a federal limitation was controlling it identified 45 U.S.C. § 153 First (r) -- a statute which would make this action timely.

The second Chevron criterion is determining whether retroactive application would retard or advance the purposes of the rule to be applied. The cicuits applying DelCostello retroactively have found its interest in uniformity controlling. The Ninth Circuit has found the reasons for allowing fair representation actions severely "disserved" by applying a shorter limitation not reasonably

predicatable to the litigant. Edwards, supra, 719 F.2d at 1040. In addition, the decision in this case has undermined a uniformity that already existed within Colorado law by virtue of Colo. Rev. Stat. § 13-80-106, and thus both serves and disserves the cause of uniformity in some measure.

The final Chevron criterion is the "inequity" attendant to applying the rule retroactively. That inequity is missing in many of the cases decided by other circuits which found the pre-DelCostello limitation to be, if anything, shorter. Here, again, the expressly applicable state limitation is longer, and rendered this action timely. See, Edwards, supra.

In sum, this case is an appropriate vehicle for this Court's resolution of the conflict in the circuits concerning

retroactive application of DelCostello and the limitation in 29 U.S.C. § 160(b).

II. THE MISSAPPLICATION OF 29 U.S.C. § 160(b) TO RAILWAY LABOR ACT CASES PROMISES FUTURE NONUNIFORMITY AND CONFLICT

The Tenth Circuit's first Barnett decision recognized the value of uniformity of the limitation for R.L.A. fair representation cases and applied 45 U.S.C. § 153 First (r), a limitation relating to Board decisions and within the four corners of the R.L.A. 729 U.S. 693. As the court correctly noted: "the refusal to apply section 153 First (r) would reject the specific policy decision made by Congress after it had viewed the competing interests involved. ... Cf. United Parcel, supra at 70 (Stewart, J., concurring)." App. 30.

Two subsequent decisions, however, from other circuits applied 29 U.S.C. § 160(b) in an R.L.A. context. Welyczo v. U.S. Air, 733 F.2d 239 (2nd Cir. 1984); Sisco v. Consol. Rail Corp., 732 F.2d 1188 (3rd Cir. 1984). On rehearing the Tenth Circuit conformed its position to that of the Second and Third Circuits. 738 F.2d 358. The very frailty of the reasoning supporting these decisions, however, makes evident the probabilty that today's superficial uniformity on this question will be short lived.

First, Welyczo contains no discussion whatsoever of 45 U.S.C. § 153 First (r). It appears that this statute was neither argued by the parties nor noted by the court. This may be because Welyczo's action would have been untimely under § 153 First (r), as well. More importantly, the

court found the distinction between the R.L.A. and the N.L.R.A. for limitations purposes "without import." This assertion will not withstand the test of time. It would require courts, in a fair representation challenge to a Board decision under Title I of the R.L.A., to simply disregard an expressly applicable statute of limitations in favor of a shorter, problematically "analogous" limitation.

Second, Sisco takes the astonishing step of applying 29 U.S.C. § 160(b) in preference to 45 U.S.C. § 153 First (r) in an action under Title I of the R.L.A. The slender textual reed for this decision is that Sisco was protesting the failure to take his case to a Board decision, and § 153 First (r) applies to decisions "under the award" of a Board. Apparently, in the Third Circuit, breach

of the duty of fair representation in the R.L.A. context now carries two statutes of limitations: 29 U.S.C. § 160(b) if the duty is breached by not purusing a case to Board decision, 45 U.S.C. § 153 First (r) if the duty is breached in the course of obtaining a Board decision. Barnett's situation falls in the latter category and, though under Title II, may presage an actual conflict between the Tenth and Third Circuits.

Finally, in Barnett the Tenth Circuit left this qualifiction:

> [W]e express no opinion about the proper limitations period to be applied to other possible "hybrid" claims ... [under] the RLA. ... The reasoning applied by the Court in DelCostello regarding the appropriate limitations period to borrow when two independently viable claims are combined might militate against borrowing the § 10(b) period in another type of

"hybrid" sitaution brought under the RLA.

App. 38 n. 4.

The reasoning, if not the square holdings, of these three cases is already difficult to reconcile with the approach of other circuits. The Ninth Circuit, for example, has characterized DelCostello's holding as limited to § 301 actions which "resemble an unfair labor practice charge." United Bro. of Carpenters & Joiners v F.M.C. Corp., 724 F.2d 816, 817 n. 1 (9th Cir. 1984) (29 U.S.C. § 160(b) inapplicable to an action by a Union to vacate an arbitration award under § 301). Accord Derwin v. General Dynamics Corp., 719 F.2d 484 (5th Cir. 1983). See, also, Int'l Union of Elec., Radio, etc. v. INGRAM, Mfg., 715 F.2d. 886 (5th Cir. 1983) (29 U.S.C. § 160(b) inapplicable

to "straight § 301" action to enforce arbitration award); Jenkins v. Local 705 Int'l Bro. of Teamsters, 713 F.2d 247 (7th Cir. 1983) (29 U.S.C. § 160(b) inapplicable to action under ERISA).

The opportunities for future conflict thus run along several lines. Potentially, courts will apply DelCostello depending upon:

(1) Whether a R.L.A. case sounds under Title I or Title II;

(2) Whether a R.L.A. fair representation case invovles an "award" by a Board, or the absence of an "award;"

(3) Whether the fair representation claim "resembles an unfair labor practice;"

(4) Whether each branch of a "hybrid" fair representation/contract

claim under the R.L.A. is "independantly viable."

The potential for conflict given these competing approaches is obvious.

The proposition that a limitation found in the R.L.A. should apply to all fair representation actions under the R.L.A. is apparently too obvious. That it would best assure uniformity of future decisions, and establish a predictable standard for litigants cannot be doubted.

DelCostello plainly requires that a federal limitation be applied in a case like this one. It does not compel use of 29 U.S.C. § 160(b) in every labor context. The Railway Labor Act provides another limitation, expressly applicable to some fair representation claims, and plainly the most nearly applicable to those its does not reach directly.

Uniformity of applicable limitations within the Railway Labor Act can only be achieved by application of 45 U.S.C. § 153 First (r) to fair representation actions under it. In the absence of such uniformity, and the presence, already, of divergent interpretations of DelCostello, future conflict is certain.

Admittedly, DelCostello and this case begin with no expressly applicable federal statute of limitations. Admittedly, DelCostello fairly compels a uniform federal standard. The question squarely presented is whether this Court's judgment that six months is both "long enough" and "short enough" for fair representation claims when comparing 29 U.S.C. § 106(b) with a variety of state statutes of limitations should control over "the specific policy decision made by Congress after it had

viewed the competing interests involved," in what is an essentially "identical" context. App. 30.

III. BARNETT'S ACTION WAS TIMELY UNDER 45 U.S.C. § 153 FIRST (r)

The only question presented by Barnett's pleading under 45 U.S.C. § 153 First (r) is whether his claim "accrued" when the Board, without his knowledge, acted, or when, over a month later, it mailed and he received, a copy of its decision.

In its first opinion the Tenth Circuit erroneously stated that Barnett had relied on Colorado law of "accrual" in arguing his action was timely under 45 U.S.C. § 153 First (r). Barnett argued that both Colorado law in relation to Colo. Rev. Stat. § 13-80-106, and federal law in relation to 45 U.S.C. § 153 First (r), placed

accrual at the point Barnett received notice of the Board decision. See, e.g., United States v. Kubrick, 444 U.S. 111, 123 (1979) (action accrues when one is "armed with the facts about the harm done to him"); Urie v. Thompson, 337 U.S. 163, 170 (1949) (accrual runs from "notice").

Indeed, even non-accrual statutes have been given essentially this construction in federal law. "'[A] limitation period begins to run "when the claimaint discovers or in the exercize of reasonable diligence should have discovered, the acts constituting the alleged [violation]"'' N.L.R.B. v. Don Burgess Const. Corp., 596 F.2d 378, 382 (9th Cir. 1979) (citations omitted, construing 29 U.S.C. § 160(b)).

This rule has been applied to fair representation claims. In Benson v.

General Motors Corp., 715 F.2d 862 (11th Cir. 1983), the court reversed a grant of summary judgment on limitation grounds. The complaint concerned deprivation of senicrity credit, and the court found the limitation began to run when the seniority list "was in fact posted at the Tuscaloosa plant" where the plaintiffs worked. 715 F.2d at 864. Lacking evidence in the record establishing this date, the court remanded for further evidentiary proceedings. See, also, Scott v. Local 863, Int'l Bro. of Teamsteres, 725 F.2d 226, 229-231 (3rd Cir. 1984) (Becker, J., concurring) (arguing that time for fair representation claim must run from date of receipt of relevant notice).

Barnett's action was plainly within two years of the time he first received notice of the Board's decision. No lack

of diligence on his part accounts for the discrepancy between the time of decision and notice of decision. His aciton was timely under 45 U.S.C. First § 153(r).

Thus, the grounds for certiorari otherwise presented are appropriately considered in this case. In addition, the discrepancy between the first Barnett opinion, though withdrawn, and the decision in Benson, supra, suggests that it is at least appropriate for this court to determine when the time for a claim of unfair representation begins to run.

CONCLUSION

For the foregoing reasons, petitioner Frank Barnett requests certiorari to the Court of Appeals for the Tenth Circuit.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing PETITION FOR WRIT OF CERTIORARI was deposited in the United States Mail, postage prepaid, this 9TH day of October, 1984, addressed to:

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Case No. _____

UNITED STATES SUPREME COURT
1984 TERM

FRANK E. BARNETT,

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UNITED AIR LINES, INC. and
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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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APPENDIX TO PETITION FOR CERTIORARI

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45 U.S.C. § 184

System, group, or regional boards of adjustment

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a

full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group or regional boards of adjustment, under the authority of seciton 3, Title I, or this Act.

Such boards of adjustment may be established by agreement between employees and carriers either on any individaul carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent

National Board of Adjustment as hereinafter provided. Nothing in this Act shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similar limited jurisdiction.

29 U.S.C. § 160(b)

Complaint and notice of hearing -- Answer -- Court rules of evidence inapplicable

Whenever it is charged that any person has engaged or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the

service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said

proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 80-Z-1380

FRANK E. BARNETT,

Plaintiff,

v.

UNITED AIRLINES, INC., et al.,

Defendants.

Order of Dismissal

THIS MATTER is before the Court on Motion to Dismiss filed by defendant United Airlines, Inc., and a Motion for Summary Judgment filed by defendant Association of Flight Attendants. The Court has heard the arguments of counsel and had rendered oral conclusions of law contained herein by reference as if fully set forth. It is therefore

ORDERED that defendant United Airlines, Inc., Motion to Dismiss is granted and the action and complaint are

hereby dismissed without prejudice, each party to pay his or its own costs, and it is

FURTHER ORDERED that defendant Association of Flight Attendants' Motion for Summary Judgment is granted and the action and complaint are dismissed without prejudice, each party to pay his or its own costs, and it is

FURTHER ORDERED that the oral motion of plaintiff to dismiss Flight Attendants and Flight Stewards in the Service of United Airlines is granted and the action and complaint are dismissed without prejudice, each party to pay his or its own costs.

DATED at Denver, Colorado this 8th day of February, 1982.

BY THE COURT: /s/ Zita L. Weinshienk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 80-Z-1380

FRANK E. BARNETT,

Plaintiff,

vs.

UNITED AIRLINES, INC., et al.,

Defendants.

REPORTER'S TRANSCRIPT

(Hearing on Motion to

Dismiss: Ruling)

THE COURT: What we have is a decision on which statute of limitations applies; and I think everyone has reached the agreement that in this area, since this is not a railway case, that the Federal statute does not apply. Section 3 is not applicable to air carriers, so we do have to look to State law to see which of the State statutes should apply, as

did the Supreme Court in United Parcel v. Mitchell.

United Parcel v. Mitchell, although under a different Federal statute, was a very analogous situation. It involved an arbitration hearing before an administrative panel. It involved a lawsuit then brought based on the failure of the union to represent the litigant at an arbitration and against the original party, although when the case came up to the Supreme Court, the union was not before the court. But the court very definitely in its decision, in United Parcel, is discussing both actions against the original party and against the union for failure to represent.

The Supreme Court indicates that although the respondent in that case did not style his suit as one to vacate the

award of the joint panel, if he's successful the suit will have that direct effect. The court goes on to indicate that the respondent was required -- that is, the respondent in United Parcel -- was required in some way to show that the union's duty to represent him fairly at the arbitration had been breached before he was entitled to reach the merits of his contract case. This makes the suit more analogous to an action to vacate an arbitration award than a straight contract action. The Supreme Court -- the majority of the court concludes with a policy decision.

"Given the choices present here and the undesirability of the result of the greivance and arbitral process being suspended in limbo for long periods, we think the District Court was correct when it chose the 90-day period imposed

by New York for the bringing of an action to vacate an arbitration award."

There are two possible statutes of limitation under State law. One is the 90-day statute similar to the New York statute to vacate an arbitration award. The other statute -- let me just give the cite on that -- that is 13-22-214.

The other statute is 13-80-106, entitled "Actions Under Federal Statute."

Were this a Colorado action under a Colorado arbitration, the policy would be very, very clear, and that would be you are required to bring your action to vacate an arbitration award within 90 days under the State statute.

If this action were exactly as it is framed against both the employer -- the original employer and against the union for breaching a duty of fair

representation, I don't think there would be any question but that the State philosophy would be that one is required to bring the action under 13-22-214, even though it might involve a tort action against the union. It is, as discussed by the Supreme Court, so wrapped up together with the fact that what is really being sought is the overturning of an arbitration award that the plaintiff would be required to come under that shorter State statute.

There is good public policy reasons for this State statute. Everyone knows that the courts are overcrowded. State and Federal Courts are overcrowded. Arbitration agreements are looked on with great favor in recent law; and in fact, parties are encouraged to participate in aribtration. Those arbitration decisions which are given,

by public policy also -- which is very clear in this statute -- to be brought to court promptly so that they can be settled and settled promptly.

We have a situation here where we don't have a State plaintiff. If we had a State plaintiff, I think there would be no question in this case. We have a plaintiff who brings the action under Federal jurisdiction, and I have no problem with the Federal jurisdiction. But the question is very strongly in my mind, even though this is clearly a case of Federal jurisdiction, whether that is one and the same as an action upon a liability created by a Federal statute.

This basically is an action under contract, fair representation of the union. It is an action which is implied under the Federal law certainly, but is this an action such as a 1982 or 1983

action where there is a liability created by Federal statute? I have serious questions whether it is.

We have, in other words, a general statute which talks about actions under a liability created by Federal statute, and it is very questionable in this Court's mind whether this is that type of action.

We have a very specific statute which indicates that where a party seeks to vacate an arbitration award, they must file the action very quickly. The question is which statute shall be applied.

The Supreme Court seems to indicate, not on precise facts but on very close, very analogous facts, that we apply the 90-day statute. In this case, the policy, I think, is the same policy as in the United Parcel v.

Mithcell case: That there is a public policy reason for having grievance and arbitration proceedings not be suspended in limbo for long periods of time. That public policy is relevant in this case just as much as it was relevant in United Parcel.

The court ruled that the statute that applies in Colorado is the 90-day statute, which requires one seeking to vacate arbitration awards to file within 90 days. Therefore, both motions should be granted.

I would also say by way of dictum that I think there are strong questions not in the malpractice area, where one discovers medical malpractice, but in an area where one is looking to the question of what date does an action accrue from an administrative awrad. There are strong questions of whether

one looks at the date that something was received by the party or actually the date of the award itself. Certainly, had there been knowledge of this award, an action could have been brought immediately after the September date announcing the decision. In other words, there could have been an appeal on September 10.

If one looks at one of the traditional definition of when an action occures, it is when one can proceed, when it is ripe enough to proceed with the appellate process. That certainly would argue that the earlier date would be the date. I don't think it's necessary for me to reach that decision.

Mr. Hobbs, if you are going to take this up to the Tenth Circuit, which I think would be perhaps helpful to clarify the law, they may or may not get

to that issue; but in any case, this Court feels that it is bound by the spirit and the policy and the law in United Parcel Service v. Mitchell and by the policy of the State of Colorado. The 90-day rule applies.

The motion to dismiss -- I think there is one motion to dismiss and one for summary judgment -- the motions are gratned. Unless there is anything further, the Court will be in recess.

(Thereupon, the hearing was concluded and the court was in recess at 9:15 a.m.)

REPORTER'S CERTIFICATE

I, Paul A. Zuckerman, Certified Shorthand Report and Official Reporter to this Court, do hereby certify that I was present at and reported in shorthand the proceedings in the foregoing manner; that I thereafter reduced my shorthand

notes to typewritten form, comprising the foregoing official transcript; further, that the foregoing official transcript is a full and accurate record of the proceedings described in the matter on the date set forth.

Dated at Denver, Colorado, this 17th day of February, 1982.

/s/ Paul A. Zuckerman, CSR, RPR

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 82-1195

FRANK E. BARNETT,

Plaintiff-Appellant

v.

UNITED AIR LINES, INC., et al.,

Defendants-Appellees

Opinion filed March 13, 1984

After examining the briefs and the appellate record, this three-judge panel has determined unanimcusly that oral argument would not be of material assitance in the determination of this appeal. See Fed. R. App. P. 34(a); Tenth Circuit R. 10(e). The case is therefore submitted without oral argument.

Plaintiff Frank E. Barnett (Barnett) appeals from an order of the district court (1) granting

Defendant-Appellee United Airlines, Inc.'s (United) motion to dismiss and (2) granting Defendant-Appellee Association of Flight Attendants' (AFA) motion for summary judgment, on the grounds that Barnett's claims are barred by a Colorado ninety-day statute of limitations. United is an air carrier subject to the provisions of the Railway labor Act, 45 U.S.C. §§ 151, et seq. (1976)[1] AFA is a labor organization representing flight attendants, such as Barnett, employed by United. In his amended complaint, Barnett alleges that United breached his contractual right under the Collective Bargaining Agreement between United and AFA, and

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1 As noted later in this opinion, however, air carriers are expressly excepted from the application of § 3, 45 U.S.C. § 153. See, §§ 201 and 202, 45 U.S.C. §§ 181 (Supp. V 1981) and 182 (1976).

that AFA violated its duty to him of fair representation. Barnett argues that United improperly adjusted his seniority statuts in violation of the Collective Bargaining Agreement. Further, he claims that AFA "demonstrated bad faith and acted arbitrarily and capriciously by failing to process [his] grievance, by failing to furnish proper representation to [him] at the arbitration hearing, and by failing to advise the arbitrator of their own practice of interpreting the collective bargaining agreement to afford seniority credit for time served in temporary inflight service supervision status." R., Vol. I (Amended Complaint) at 12.

The Collective Bargaining Agreement between United and AFA controls pay rates, rules, and working conditions for

United flight attendants. Further, the Agreement established an arbitration board (System Board of Adjustment) pursuant to section 204 of the Railway Labor Act, 24 U.S.C. § 184 (1976). This Board is authorized to render final, binding decisions on grievance disputes between United and its employees.

Barnett filed his grievance purusant to the Agreement based upon his contention that United improperly adjusted his seniority status. The System Board denied Barnett's grievance in a decision dated September 7, 1978, which he received "several days later." R., Vol. I (Amended Complaint) at 12. On October 14, 1980, Barnett filed the present action in federal district court. For relief, Barnett asked the court, inter alia, to "vacate the award of the System Board of Adjustment ... and

restore the plaintiff to his proper seniority statuts."[2] R., Vol. I (Amended Complaint) at 13. The district court dismissed the action based on United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981), finding that the applicable statute of limitations was Colo. Rev. Stat. § 13-22-214(2) (Supp. 1982), which establishes a ninety-day limitation period for an action brought to vacate an arbitration award.

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[2] Because Barnett styled his suit in this manner and because if he were successful, the suit would effectively vacate the Board's award, we will view this as an action to vacate an arbitration award. See United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 61 (1981). In United Parcel, the Supreme Court noted that even though a plaintiff seeking review of an arbitration award characterizes an action in a particular manner, i.e., as one for breach of contract, "they overlook the fact that an arbitration award stands between the employee and any relief which may be awarded against the company." Id. at 62-63 n.4.

The issues on appeal are (1) whether the District Court erred in applying the ninety-day Colorado statute of limitations and (2) whether Barnett timely filed this action under the applicable statute. We hold that the District Court erred in applying the Colorado statute; 45 U.S.C. § 153 First (r) (two years) is the appropriate statute of limiations for this cause. We further hold, however, that Barnett failed to file this action within the requisite two-year limitations period. We will, therefore, affirm the dismissal of this action.

I.

Although air carriers are subject to most provisions of the Railway Labor

Act,[3] they are expressly excepted from § 3, 45 U.S.C. § 153 (1976) (hereinafer cited as "section 153"). See 45 U.S.C. § 181 (Supp. V 1981). Section 153 provides for the establishment of a National Adjustment Board for railroads. Specifically, 45 U.S.C. § 153 First (r) provides for a two-year limitations period for any action at law brought on an award by a division of the adjustment board. In section 204 of the Act, 45 U.S.C. § 184 (1976), Congress authorized the airline industry to establish "local" boards having the same jurisdiction exercised

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[3] Air carriers are subject to § 1, 45 U.S.C. § 151 (1976) (definitions); § 2, 45 U.S.C. § 151a (1976) (statement of purposes); §§ 4 and 5, 45 U.S.C. §§ 154 and 155 (1976) (National Mediation Board); and §§ 7, 8, and 9, 45 U.S.C. §§ 157, 158, and 159 (1976) (voluntary arbitration and emergency boards). See §§ 201 and 202, 45 U.S.C. § 181 (Supp. V 1981) and 182 (1976).

by system, group, or regional boards of adjustment authorized under section 153. In section 205 of the Act, 45 U.S.C. § 185 (1976), Congress authorized the National Mediation Board to establish, when it deems necessary, a National Board of Adjustment for air carriers similar to the railroads' national board. However, no provisions is expressly made for a limitations period governing actions at law to review air carrier board decisions.

The Supreme Court has repeatedly held that when Congess has not expressly provided a statute of limitations governing federal statutory actions, a court must apply the most "'appropriate state statute of limitations.'" United Parcel, supra at 60 (quoting Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975) and Auto Workers v.

Hoosier Cardinal Corp., 383 U.S. 696, 704-705 (1966)). The district court adopted the appellees' position that United Parcel is dispositive of the issue before us. We disagree. As we will discuss, the uniqueness of the Railway Labor Act prevents the mechanical application of United Parcel to the circumstances before us.[4]

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[4] United Parcel was an action for wrongful discharge brought by an employee (a car washer) against his employer (United Parcel Service, Inc.) under section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1976). The employee's Union filed a grievance on his behalf, which was submitted to arbitration before a joint panel (union and company representatives) pursuant to their collective bargaining agreement. After hearing, the joint panel rendered a binding decision upholding the discharge. The employee subsequently filed an action at law under section 301(a), alleging that the Union had breached its duty of fair representation and that UPS

In Occidental Life Ins. Co. v EEOC, 432 U.S. 355, 367 (1977), the Supreme Court noted that a state statute of limitations will not be "mechanically applied" merely because the federal statute failes to expressly provide for a limitations period. The Court emphasized that "'[a]lthough state law is our primary guide in this area, it is not, to be sure, our exclusive guide.'"

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[4] (cont.) discharged him for reasons other than those stated, in violation of the collective bargaining agreement. United Parcel, supra at 58-59.

The Supreme Court held the employee's suit was effectively one to vacate an arbitration award. Id. at 61. Further, because Congress had failed to provide an express limitations period for section 301 actions, the "most appropriate one provided by state law" must be applied. Id. at 60. Thus, one Court held that the New York ninety-day statute of limitations for an action to vacate an arbitration award was proper -- it was consistent with the federal law policy of rapidly disposing of disputes in that sector. Id. at 63-64.

Id. (quoting Johnson v. Railway Express Agency, supra at 465). We must not borrow a state limitations period if its application would be inconsitent with federal policy. Occidental, supra (citing Johnson v. Railway Express Agency, supra; Auto Workers v. Hoosier Cardinal Corp., supra at 701; and Bd. of County Comm'rs v. United States, 308 U.S. 343, 352 (1939)). However, even when a state statute appears "appropriate," if another relevant federal statute exists that clearly reflects the interests Congress intended to protect under the federal statute in

question, we must apply it.[5] Johnson v. Railway Express Agency, supra at 462.

With this directive in mind, we hold that the two-year limitations period expressed in section 153 First (r) applies to actions at law brought to review adjustment board decisions made in the airline industry. See Gordon v. Eastern Airlines, Inc., 268 F. Supp. 210, 212-13 (W.D.Va. 1967). But see Richey v. Hawaiian Airlines, Inc., 533

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[5] In United Parcel, the Court declined to consider an argument raised in an amicus brief concerning the application of a relevant federal statute of limitations because it was not raised in the lower courts. The majority opinion in United Parcel dealt only with the limited issue of which state limitations period should be borrowed, not the propriety of such borrowing. See United Parcel, supra at 60 n. 2. For a detailed discussion of this question as it applies to section 301(a) of the Labor Management Relations Act, see United Parcel, id. at 65-71 (Stewart, J., concurring).

F. Supp. 310, 313 (M.D.Ga. 1982); Hafer v. Air Line Pilot's Ass'n Int'l, 525 F. Supp. 874, 877 (D. Hawaii 1981), aff'd, 698 F.2d 1230 (9th Cir. 1983). Although the Railway Labor Act's express purpose of settling disputes in the airline industry in a prompt and orderly manner would be served by applying the Colorado ninety-day statute, the refusal to apply section 153 First (r) would reject the specific policy decision made by Congress after it had viewed the competing interests involved. Congress determined two years as an appropriate period for seeking judicial review of railroad adjustment board awards in light of the national interests in prompt and orderly resolutions, and an employee's interest in setting aside what he feels is an improper award. Cf.

United Parcel, supra at 70 (Stewart, J., concurring).

After studying the entire Railway Labor Act[6] and its legislative history, it is clear that Congress intended the exception of section 153 from air carriers to be temporary. The "initial omission of § 153 in 1936 was merely to postpone the establishment of a National Air Transport Adjustment Baord while the airlines industry grew. It was not intended to provide an interim period of confusion and chaos." Gordon, supra at 213. See also Int'l Ass'n of Machinists v. Central Airlines, Inc., 372 U.S. 682, 685-90 (1963), for a

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[6] Generally, the intent of the Act is to minimize interruption of the rail and air transportation services of the nation caused by strikes and labor disputes, whether minor or major. Gordon v. Eastern Airlines, Inc., 268 F. Supp. 210, 212 (W.D.Va. 1967); 45 U.S.C. § 151a (1976).

discussion of the history and intent of the Railway Labor Act. Thus, the interests balanced by Congress when it enacted section 153 First (r) are identical to those which would apply to the now firmly-established airline industry. Therefore, by applying section 153 First (r) to actions involving air carriers, we would be assenting to all mandates and concerns: to enforce the intent and purpose of the entire Railway Labor Act, to establish the needed uniformity in federal procedural law for similar claims,[7] and to apply a "relevant federal

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[7] See United Parcel, supra at 70 (Stewart, J., concurring) (quoting Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 702 (1966)). Because the bulk of the Railway Labor Act pertains to air carriers, to apply different state laws regarding limitations periods to similar actions under the Act would result in "confusion and chaos."

statute" in the absence of a limitations period expressed by Congress. The limitations period expressed in section 153 First (r) clearly "fit[s] hand in glove" with an action brought before an airline adjustment board under the Railway Labor Act. See United Parcel, supra at 64.

II.

We must next determine whether Barnett filed for judicial review within the time constraints of section 153 First (r). Section 153 First (r) provides:

> All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after. (Emphasis added.)

The dispositive question, therefore, is at what time the cause of

action "accrues." Because Barnett's action was filed essentially to review the Board's decision, see supra note 2, we hold that his action accrued the date that decision was rendered.[8] Gatlin v. Missouri Pacific R.R. Co., 631 F.2d 551, 554-555 (8th Cir. 1980). On September 7, 1978, the Board rendered its decision concerning Barnett, which

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[8] Barnett contends that the Colorado tolling rules, which apply to this cause, require the word "accrued" to be equated with the "rule of discovery." Appellant's Opening Brief at 18-19. Thus, Barnett urges us to hold that his cause accrued when he received the letter of the Board's decision -- "several days" after October 13, 1980. We disagree. Because we have applied section 153 First (r) to this action, the Colorado tolling and accrual rules are inapplicable. Barnett is asserting rights based on federal law and, thus, we are presented with a federal question. See Gatling v. Missouri Racific R.R.Co., 631 F.2d 551,554 (8th Cir. 1980) (citing Vaca v. Sipes, 386 U.S. 171, 177 (1967); Steele v. Louisville & Nashville R.R.Co., 323 U.S. 192, 203-205 (1944)).

was final. See 45 U.S.C. §§ 153 First (m) and 184 (1976). Pursuant to section 153 First (r), Barnett had two years from that date to bring an action at law in federal district court. Because he filed his action for review on October 14, 1980, Barnett's action is untimely and was, thus, properly dismissed by the district court.

In sum, we reverse the district court's finding that the Colorado ninety-day statute of limitations to vacate anarbitration award, but we affirm the court's finding that Barnett

failed to file timely his action at law.[9]

REVERSED in part and AFFIRMED in part.

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[9] In rendering this opinion, we need not address the question whether the district court may review this final and binding decision of the Baord. We will note, generally, however, that the scope of review by a federal court of a decision by an airline system board of adjustment is extremely narrow. See, e.g., Hall v. Eastern Airlines, Inc., 511 F.2d 663, 663-664 (5th Cir. 1975) (citing Gunther v. San Diego & Arizona Eastern R.R. Co., 382 U.S. 257, 263 (1965)); Union Pacific R.R. Co. v. Sheehan, 439 U.S. 89, 93-95 (1978), reh'g denied, 439 U.S. 1135 (1979) (railroad adjustment boards).

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 82-1195

FRANK E. BARNETT,

Plaintiff-Appellant,

v.

UNITED AIR LINES, INC., et al.,

Defendants-Appellees.

Opinion filed June 21, 1984

The court does hereby grant appellant's petition for rehearing, recall the mandate, withdraw the opinion in Barnett v. United Air Lines, Inc., 729 F.2d 693 (10th Cir. 1984), vacate the judgment, and render this Opinion on Rehearing in lieu thereof.

Plaintiff Frank E. Barnett appeals from an order of the district court (1) granting Defendant-Appellee United Airlines, Inc.'s (United) motion to dismiss and (2) granting

Defendant-Appellee Association of Flight Attendants' (AFA) motion for summary judgment, on the grounds that Barnett's claims are barred by a Colorado ninety-day statute of limitations. United is an air carrier subject to the provisions of the Railway Labor Act (RLA), 45 U.S.C. §§ 151 et seq. (1976).[1] AFA is a labor organization representing flight attendants, such as Barnett, employed by United. In his amended complaint, Barnett alleges that United violated his contractual right under the Collective Bargaining Agreement between United and AFA, and that AFA breached its duty to him of fair representation. Barnett

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[1] Air carriers, however, are expressly excepted from the application of § 3, 45 U.S.C. § 153. See §§ 201 and 202, 45 U.S.C. §§ 181 (Supp. V 1981) and 182 (1976).

argues that United improperly adjusted his seniority status in violation of the Collective Bargaining Agreement. Further, he claims that AFA "demonstrated bad faith and acted arbitrarily and capriciously by failing to process [his] grievance, by failing to furnish proper representation to [him] at the arbitration hearing, and by failing to advise the arbitrator of their own practice of interpreting the collective bargaining agreement to afford seniority credit for time served in temporary inflight service supervision status." R., Vol. I (Amended Complaint) at 12.

The Collective Bargaining Agreement between United and AFA controls pay rates, rules, and working conditions for United flight attendants. Further, the Agreement estabished an Arbitration

Board (System Board of Adjustment) pursuant to § 204 of the RLA, 45 U.S.C. § 184 (1976). This board is authorized to render final, binding decisions on grievance disputes between United and its employees.

Barnett filed a grievance pursuant to the Agreement based upon his contention that United improperly adjusted his seniority status. The Board denied Barnett's grievance in a decision dated September 7, 1978, a decision of which Barnett was first notified by a letter dated October 13, 1978, which he received "several days later." R., Vol. I (Amended Complaint) at 12. On October 14, 1980, Barnett filed the present action in federal district court where the court dismissed it based on United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981). The

district court found that the applicable statute of limitations was Colo. Rev. Stat. § 13-22-214(2) (Supp. 1982), which establishes a ninety-day limitation period for an action brought to vacate an arbitration award. The district court found Mitchell controlling apparently because Barnett styled his suit in a manner in which he requested the award of the Board to be set aside (see R., Vol. I (Amended Complaint) at 13), and a successful suit would have effectively vacated the award. See R., Vol. II at 2-4; United Parcel Service, Inc. v. Mitchell, supra at 61.

The issues on appeal are (1) whether the district court erred in applying the ninety-day Colorado statute of limitations and (2) whether Barnett timely filed this action under the applicable statute. We hold that the

district court erred in borrowing the Colorado statute; § 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(b) (1982) (six months), is the appropriate statute of limitations for this cause. We further hold, however, that Barnett failed to file this action within the requisite six-month limitations period. We will therefore affirm the dismissal of this action.

I.

Background

Because the instant case arose under the RLA, a brief explanation of the Act and Barnett's claim will be helpful. By enacting the RLA, Congress intended to provide a separate and distinct statutory scheme for labor disputes arising in two vital national industries, i.e., the rail industry and

the air carrier industry. Labor disputes between parties in other industries are governed by the NLRA. Generally, the RLA recognizes two types of disputes: (1) "major" disputes, which relate to the formation of collective bargaining agreements or efforts to secure them; and (2) "minor" disputes, which involve the interpretation of a collective bargaining agreement, the existence of which is not in dispute. See Elgin, J. & E.R. Co. v. Burley, 325 U.S. 711, 723 (1945); Transport Workers Union of America v. American Airlines, Inc., 413 F.2d 746, 748 (10th Cir. 1969); De La Rosa Sanchez v. Eastern Airlines, Inc., 574 F.2d 29, 31 (1st Cir. 1978). 45 U.S.C. § 184 mandates that air carriers and their employees, acting through their representatives, establish system

boards of adjustment to resolve the minor disputes. Machinists v. Central Airlines, supra. See also Transport Workers v. American Airlines, supra. When an aggrieved party appeals an adjustment board decision to federal district court, the findings and order of the board are conclusive against the parties unless (1) the board failed to comply with the requirements of the RLA, (2) the board lacked jurisdiction, or (3) there was fraud or corruption by a member of the board. 45 U.S.C. §§ 153(q) and 184 (1976).

It is well established, therefore, that decisions by adjustment boards which merely interpret collective bargaining agreements are conclusive and binding on the parties; no federal or state court has jurisdiction to review such a determination by an adjustment

board. See, e.g., Union Pacific R.R. Co. v. Sheehan, 439 U.S. 89, 94 (1978), reh'g denied, 439 U.S. 1135 (1979); Air Line Pilots Ass'n v. Northwest Airlines, Inc., 627 F.2d 272, 275 (D.C.Cir. 1980); De La Rosa Sanchez v. Eastern Airlines, supra at 32. Because Barnett claims that United beached the Collective Bargaining Agreement regarding the seniority status provisions, the Board's decision merely involved its own interpretation of the Agreement. This is precisely the type of dispute Congress contemplated to be conclusively resolved in a prompt manner by an adjustment board. See Union Pacific R.R. Co. v. Sheehan, supra at 94; Brotherhood of Locomotive Fireman and Enginemen v. Central of Georgia Ry. Co., 199 F.2d 384, 385 (5th Cir. 1952), cert. denied, 345 U.S. 908 (1953). Hence, the

district court would have been without jurisdiction to review that claim standing alone.

However, by styling his suit as a hybrid involving both a contract and a fair representation claim, Barnett is potentially able to challenge the propriety of the Board's decision. If an employee can estabish that his union breached its implied duty of fair representation, then even a binding decision of the board can be set aside if the breach seriously undermined the integrity of the arbitral process. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 567 (1976); Del Casal v. Eastern Airlines, Inc., 634 F.2d 295, 299 (5th Cir. 1981), cert. denied, 454 U.S. 892 (1981). Thus, if Barnett could show that AFA's alleged breach reached this level, the district court could

also entertain jurisdiction on the breach of contract claim.[2] See Del Casal v. Eastern Airlines, supra at 298-300.

II.

Statute of Limitations: Applicability of DelCostello v. International Brotherhood of Teamsters

Inasmuch as we have established that Barnett has a potentially valid claim on the hybrid nature of his action, we must now determine the appropriate limitations period within which that claim must be brought. In the instant case, there is no express

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[2] Of course, just as with the district court, it is not necessary for us to decide the merits of Barnett's claims at this preliminary stage. We discuss this jurisdictional question only for the limited purpose of showing the potential viability of a hybrid claim such as that presented by Barnett.

statute of limitations provided in the RLA for suits in the air carrier industry brought by an employee either against his employer for breach of the collective bargaining agreement or against his union for breach of the duty of the duty of fair representation. First, it is clear from the discussion above that a sole claim involving an alleged breach of a collective bargaining agreement may not be maintained in federal court. Hence, there is obviously no express limitations period for such a claim. Similarly, Barnett's claim against AFA is not controlled by an express limitations period. Although it is well established that an action for breach of duty of fair representation between parties subject to the RLA is implied from 45 U.S.C. §§ 151 and 152, see,

eg., Vaca v. Sipes, 386 U.S. 171, 177 (1967); Steele v. Louisville and Nashville R.R. Co., 323 U.S. 192, 199 and 202-03 (1944), these sections do not provide expressly for a limitations period. Hence, we are required to borrow an appropriate statute of limitations.

During the pendency of this appeal, the Supreme Court decided the case of DelCostello v. International Brotherhood of Teamsters, ___ U.S. ___, 103 S.Ct. 2281 (1983). The Court in DelCostello held that where an employee brought an action under the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151, et seq., against both his employer for breach of the collective bargaining agreement (19 U.S.C. § 185) and his union for breach of the duty of fair representation, the suit was governed by

the six-month period of limitations mandated in § 10(b) of the NLRA, 29 U.S.C. § 160(b). Although the instant case does not arise under the NLRA, we nonetheless hold that on the particular facts of this case, where Barnett made claims against his employer and his union similar to those in DelCostello, the rationale of DelCostello requires the application of the six-month period under § 10(b) of the NLRA to Barnett's cause of action.

The Supreme Court has repeatedly held that when Congress has not expressly provided a statute of limitations governing federal statutory actions, a court must apply the most "'appropriate state statute of limitations.'" United Parcel Service, Inc. v, Mitchell, supra at 60 (quoting Johnson v. Railway Express Agency, Inc.,

421 U.S. 454, 462 (1975) and Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 704-05 (1966)). This has been the approach followed by some courts when determining a limitations period for a duty of fair representation claim under the RLA. See Price v. Southern Pacific Transportation Co., 586 F.2d 750, 752-53 (9th Cir. 1978); Brotherhood of Locomotive Firemen and Enginemen v. Mitchell, 190 F.2d 308, 313 (5th Cir. 1951); Gainey v. Brotherhood of Railway and Steamship Clerks, 275 F. Supp. 292, 306 (E.D.Pa. 1967), aff'd on other grounds, 406 F.2d 744 (3rd Cir. 1968), cert. denied, 394 U.S. 998 (1969). However, based on the Supreme Court's recent directives in DelCostello and Occidential Life Ins. Co. v. EEOC, 432 U.S. 355 91977), we decline to borrow an

appropriate state limitations period in the instant case.

In Occidental, the Court noted that a state statute of limitations will not be "mechanically applied" merely because the federal statute fails to provide expressly for a limitations period. Id. at 367. The Court emphasized that "'[a]lthough state law is our primary guide in this area, it is not, to be sure, our exclusive guide.'" Id. (quoting Johnson v. Railway Express Agency, supra at 465). For example, we must not borrow a state limitations period if its application would be inconsistent with federal policy. Occidental, supra (citing Johnson v. RAilway Express Agency, supra; Auto Workers v. Hoosier Cardinal Corp., supra at 701; and Bd. of County Comm'rs v. United States, 308 U.S. 343, 352 (1939)).

Even when a state statute appears "appropriate," if another relevant federal statute exits that clearly reflects the interests Congress intended to protect under the federal statute in question, we must apply it.[3] Johnson v. Railway Express Agency, supra at 462.

The Court in DelCostello reaffirmed its holding in Occidental that a court must borrow express limitations periods from related federal statutes when state statutes may be unsatisfactory for the enforcement of federal law. 103 S.Ct.

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[3] In Mitchell, the Court declined to consider an argument raised in an amicus brief concerning the application of a relevant federal statute of limitations (§ 10(b) of the NLRA) because it was not raised at any stage of the proceedings. The majority opinion in Mitchell dealt only with the limited issue of which state limitations period should be borrowed, not the propriety of such borrowing. See 451 U.S. at 60 n.2.

at 2289. The Court held that the six-month statute of limitations expressly provided for by § 10(b) of the NLRA should apply to a hybrid beach of contract/duty of fair representation claim brought pursuant to that Act; a breach of the implied duty of fair representation is most analogous to an "unfair labor practice," which is actionable before the National Labor Relations Board under § 10 of the NLRA. id. at 2293. The Court reasoned that the § 10(b) limitations period reflects the competing interests at stake in such a hybrid claim brought under the NLRA.

> In § 10(b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an

> unjust settlement under the collective-bargaining system.

Id. at 2294 (quoting United Parcel Service, Inc. v. Mitchell, supra at 70 (Stewart J., concurring)).

We find that the identical competing interests recognized in DelCostello are present in the instant action brought under the RLA. Section 10(b) of the NLRA is similarly relevant to a hybrid breach of contract/duty of fair representation claim brought under the RLA; thus, the reasoning and analysis of DelCostello control in the instant case. An employee like Barnett, therefore, who files such a hybrid claim under the RLA in federal district court, must do so within the six-month period

provided in § 10(b) of the NLRA.[4] Welyczo v. U.S. Air, Inc., No. 83-7976 (2nd Cir. 1984).

III.

Timeliness of Filing

We must next determine whether Barnett filed this action within the time contraints of § 10(b). Because Barnett brought his action essentially to review the propriety of the Board's decision based on the alleged unfair

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[4] In rendering this decision, we express no opinion about the proper limitations period to be applied to other possible "hybrid" claims brought by an employee subject to the RLA. Our decision is limited to the particular context of "hybrid breach of contract/ duty of fair representation" claims made by an employee pursuant to the RLA. The reasoning applied by the Court in DelCostello regarding the appropriate limitations period to borrow when two independantly viable claims are combined might militate against borrowing the § 10(b) period in another type of "hybrid" situation brought under the RLA. See 103 S.Ct. at 2292.

representation by AFA at the hearing, we hold that he was required to file the action within six months of the date the Board rendered its decision. Cf. Butler v. Local Union 823, Internat'l Brotherhood of Teamsters, 514 F.2d 442, 449-50 (8th Cir. 1975), cert. denied, 423 U.S. 924 (1975). Because the Board rendered its decision on September 7, 1978, Barnett was required to file the instant action by March 7, 1979. Barnett filed the action, however, on October 14, 1980, clearly beyond the six-month limitations period. Thus, the district court properly dismissed Barnett's complaint.

REVERSED in part and AFFIRMED in part.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 82-1195

FRANK E. BARNETT,

Plaintiff-Appellant,

v.

UNITED AIRLINES, INC., et al.,

Defendants-Appellees.

July 10, 1984

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned cause.

Upon consideration whereof, appellant's petition for rehearing is denied.

/s/ HOWARD K. PHILLIPS, Clerk.

(3)

No. 84-676

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FRANK E. BARNETT,

Petitioner,

v.

UNITED AIR LINES, INC.

and

ASSOCIATION OF FLIGHT ATTENDANTS,

Respondents.

BRIEF OF ASSOCIATION OF FLIGHT ATTENDANTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the Court below properly applied the six-month statute of limitations established in DelCostello v. Int'l Brotherhood of Teamsters, 103 S.Ct. 2281 (1983) for hybrid breach of contract/duty of fair representation claims to bar identical claims against an employer and union subject to the Railway Labor Act which were not asserted until over two years after the last alleged wrongful act?

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No. 84-676

In The

SUPREME COURT OF THE UNITED STATES

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FRANK E. BARNETT,

Petitioner,

v.

UNITED AIR LINES, INC.

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ASSOCIATION OF FLIGHT ATTENDANTS,

Respondents.

BRIEF OF ASSOCIATION OF FLIGHT ATTENDANTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Statement of the Case

On September 7, 1978, an arbitration board denied the grievance of Frank

Barnett, a flight attendant employed by United Air Lines, Inc. ("United"). Barnett first challenged that decision when he filed the present action on October 14, 1980 against United and the Association of Flight Attendants ("AFA"), asserting breach of contract and of the duty of fair representation. A. 40-42.[1] The District Court, in accordance with United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981) ("Mitchell"), dismissed the action as untimely under the ninety-day limitations period in Colorado for an action to vacate an arbitration award. A. 42-43.

During the pendency of Barnett's appeal, this Court held in DelCostello v. Int'l Brotherhood of Teamsters, 103 S.Ct.

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[1]Citations of Opinions and Orders of the Court below are to pertinent pages in Petitioner's Appendix ("A.").

2281 (1983) ("DelCostello"), that a six-month statute of limitations should apply to hybrid breach of contract/duty of fair representation actions. Thereafter, the Court of Appeals for the Tenth Circuit applied DelCostello to identical hybrid claims presented in Barnett, finding no significance in the fact that the parties in Barnett were subject to the Railway Labor Act ("RLA"), while those in DelCostello came under the National Labor Relations Act ("NLRA"):

> "We find that the identical competing interests recognized in DelCostello are present in the instant action brought under the RLA. Section 10(b) of the NLRA is similarly relevant to a hybrid breach of contract/duty of fair representation claim brought under the RLA; thus, the reasoning and analysis of DelCostello control in the instant case. An employee like Barnett, therefore, who filed such a hybrid claim under the RLA in federal district court, must

> do so within the six-month period provided in §10(b) of the NLRA." A. 57-58.[2]

The Court affirmed dismissal of Barnett's action, filed long beyond the six month limitations period. A. 59. Barnett's Petition for Rehearing was denied. A. 60.

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[2]An earlier opinion by the Court of Appeals in Barnett (A. 20-38) failed to reference DelCostello (although AFA had urged DelCostello's applicability, Supplemental Brief, filed July 26, 1983), and instead affirmed dismissal because the action was not filed within the two year limitations period provided in 45 U.S.C. §153 First(r) of the RLA for actions to review orders of railroad adjustment boards. A. 25. After the Court received further submissions from the parties (AFA letters of March 26 and May 14, 1984, pursuant to FED. R. APP. P. 28(j); United Memorandum, filed on or about March 27, 1984; Barnett Petition for Rehearing), it withdrew and vacated its earlier decision, and applied DelCostello. A. 39, 49.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. The Decision Below, Applying DelCostello Retroactively, is Consistent With The Decisions of Nine Other Circuits and With This Court's Own Treatment of DelCostello

Barnett's argument that the Court below erred in applying DelCostello retroactively to bar his claims is contrary to the holdings of the appellate courts in ten circuits,[3] and to the general rule in favor of retroactivity. Thorpe v. Housing Authority of City of Durham, 393 U.S. 268, 281-82 (1969). Retroactive application of DelCostello also satisfies the standards of Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971). DelCostello did not overrule clear past precedent and

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[3]In addition to the Tenth Circuit's decision herein, the following have applied DelCostello retroactively: Graves v.

(footnote continued)

its retroactive application would further the federal interests in relatively prompt resolution of labor disputes and consistency embodied in DelCostello, and produce no substantial inequitable results. Graves v. Smith's Transfer

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(footnote continued)
Smith's Transfer Corp., 736 F.2d 819 (1st Cir. 1984); Welyczko v. U.S. Air, Inc., 733 F.2d 239 (2d Cir. 1984); Perez v. Dana Corp., Parish Frame Division, 718 F.2d 581 (3d Cir. 1983); Murray v. Branch Motor Express Co., 723 F.2d 1146 (4th Cir. 1983), cert. denied, 53 U.S.L.W. 3287 (Oct. 16, 1984); Edwards v. Sea-Land Service, Inc., 720 F.2d 857 (5th Cir. 1983); Curtis v. Int'l Brotherhood of Teamsters, Local 299, 716 F.2d 360, 361 (6th Cir. 1983); Ernst v. Indiana Bell Telephone Co., Inc., 717 F.2d 1036, 1038 (7th Cir. 1983), cert. denied, 104 S.Ct. 707 (1984); Lincoln v. District 9, Int'l Ass'n of Machinists, 723 F.2d 627 (8th Cir. 1983); Rogers v. Lockheed-Georgia Co., 720 F.2d 1247 (11th Cir. 1983), cert. denied, 53 U.S.L.W. 3287 (Oct. 16, 1984). Only the Ninth Circuit has held to the contrary. Edwards v. Teamsters Local Union No. 36, 719 F.2d 1036 (9th Cir. 1983), cert. denied, 104 S.Ct. 1599 (1984).

Corp., 736 F.2d at 820-22; Perez v. Dana Corp., 718 F.2d at 584-88; Edwards v. Sea-Land Service, 720 F.2d at 860-63; Lincoln v. District 9, Int'l Ass'n of Machinists, 723 F.2d at 629-30; Rogers v. Lockheed-Georgia Co., 720 F.2d at 1249-50. Barnett cites no evidence of any "uniformity that already existed within Colorado law" prior to DelCostello. Petition ("Pet."), p. 15.[4]

Moreover, this Court applied the six-month limitations period retroactively to the claims before it in DelCostello, as several lower courts have observed. Welyczko v. U.S. Air, 733 F.2d at 241; DelCostello v. Int'l Brotherhood of Teamsters, 101 LC ¶11,190 at 22,875 (D. Md. 1984) (on remand); Graves v. Smith's

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[4]Cf. Edwards v. Teamsters Local Union No. 36, 719 F.2d at 1040 (asserted clear past precedent under California law prior to DelCostello).

Transfer Corp., 736 F.2d at 820; Lincoln v. District 9, Int'l Ass'n of Machinists, 723 F.2d at 630; Rogers v. Lockheed-Georgia Co., 720 F.2d at 1249. See also Int'l Brotherhood of Teamsters v. Edwards, 103 S.Ct. 3104 (1983) and District 1199, National Union of Hospital and Health Care Employees v. Assad, 104 S.Ct. 54 (1983) (vacating and remanding for further consideration in light of DelCostello).

The retroactive application of DelCostello does not present an issue warranting Supreme Court review.

II. There is No Conflict in the Circuits Regarding the Appropriate Limitations Periods for a Breach of Contract/Duty of Fair Representation Claim Under the Railway Labor Act Which Requires Supreme Court Resolution

Barnett asserts there is but "frail" and "superficial" appellate authority that the six-month limitations period adopted in DelCostello applies to breach of contract/duty of fair representation claims arising under the Railway Labor Act, Pet., p. 17, but five other circuits have joined the Court below in so holding. Welyczko v. U.S. Air, 733 F.2d at 240; Sisco v. Consolidated Rail Corp., 732 F.2d 1188, 1193 (3d Cir. 1984); Ranieri v. United Transportation Union, 743 F.2d 598, 600 (7th Cir. 1984); Hunt v. Missouri Pacific R.R., 729 F.2d 578, 581 (8th Cir. 1984); Barina v. Gulf Trading

and Transp. Co., 726 F.2d 560, 563 n.6 (9th Cir. 1984).[5] This "uniformity" of appellate authority, Pet., p. 17, is not undermined because a different limitations period may be appropriate for actions not involving hybrid breach of contract/fair representation claims. Cf. Pet., pp. 20-21.

Moreover, application of the same statute of limitations to hybrid claims under the RLA and the NLRA is entirely logical. The substantive standards for the duty of fair representation are identical under both statutes. See Int'l

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[5]Accord, Lang v. Consolidated Rail Corp., 579 F.Supp. 705, 708 (E.D. Mich. 1984); Ashby v. American Airlines, Inc., 115 LRRM 2522, 2523 (W.D. Tenn. 1983); contra Henry v. Air Line Pilots Ass'n, Int'l, 585 F.Supp. 376, 379-80 and n.2 (N.D. Ga. 1984) (relying on earlier (withdrawn) Barnett decision and noting anomaly of having different limitations periods for RLA and NLRA employees).

Brotherhood of Electrical Workers v. Foust, 442 U.S. 42, 46-48 and n.8 (1979). Compare, e.g., Steele v. Louisville & Nashville R. Co., 323 U.S. 192 (1944) and Czosek v. O'Mara, 397 U.S. 25 (1970) (RLA cases) with Vaca v. Sipes, 386 U.S. 171 (1967) and Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976) (NLRA cases). See also Mitchell, 451 U.S. at 66 n.2 (Stewart, J., concurring). The same is true of the principles applicable to hybrid breach of contract/fair representation suits. Compare Czosek with Hines, cited in DelCostello. 103 S.Ct. at 2290-92. Both statutes present the same "'balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under a

collective bargaining system.'" DelCostello, 103 S.Ct. at 2294 (quoting Mitchell, 451 U.S. at 70 (Stewart, J., concurring)). A. 56-58.

Nor is Supreme Court review required to consider Barnett's attempt to substitute the two year period for vacating railroad arbitration awards, 45 U.S.C. §153 First(r), for the six-month DelCostello period. Section 153 First(r) is not "expressly applicable to some fair representation claims," Pet., p. 22, even where railroad arbitration awards are involved.[6] Ranieri v. United Transportation Union, 743 F.2d at 600. Cf. Pet., pp. 23-24 (citing only the withdrawn decision of the Court of

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[6]45 U.S.C. §153 is inapplicable to the airline industry. 45 U.S.C. §181.

Appeals herein).[7] As DelCostello cautions, analogizing an action to vacate an arbitration award (to which §153 First(r) is addressed) to a hybrid claim (such as presented here), is "problematic at best," 103 S.Ct. at 2292, because an arbitral panel "'could not resolve the employee's claim against the union.'" Id. (quoting Mitchell, 451 U.S. at 73 (Stevens, J., concurring in part and dissenting in part)). In addition, any use of "an arbitration limitations period" would result in "knotty problems

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[7]In Sisco v. Consolidated Rail Corp., the Third Circuit applied the six-month DelCostello period rather than §153 First(r) to a RLA breach of contract/duty of fair representation claim that involved a failure to pursue a grievance to arbitration. Contrary to Barnett's assertion, Pet., pp. 18-19, Sisco "did not reach the question whether [the six-month] period necessarily applies to a DFR action for the arbitrary or discriminatory litigation of a final board award." 732 F.2d at 1194 n.7.

of characterization and consistency," DelCostello, 103 S.Ct. at 2291 n.16, forcing a court to either treat unarbitrated grievances as if they had proceeded to arbitration, or to select different limitations periods for challenges to conduct at different stages of the grievance machinery when the substantive considerations are "not significantly different." Id. Cf. Pet., pp. 19, 21. Finally, use of the two year limitations period in §153 First(r), like "application of a longer malpractice statute as against unions," DelCostello, 103 S.Ct. at 2292 (which might be as short as one year, id. at 2292 n.18) "would preclude the relatively rapid final resolution of labor disputes favored by federal law." Id.[8]

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[8]Any issue concerning when Barnett's claims accrued, Pet., pp. 24-27, does
(footnote continued)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(footnote continued)
not present an independent ground for review, since suit was filed far longer than six months after Barnett's action accrued, however measured. Assuming, arguendo, that the two year limitations period of §153 First(r) instead applied, the suit would still be time-barred, as the Court below held in its original decision. A. 35-38. Accord, Gatlin v. Missouri Pacific R.R. Co., 631 F.2d 551, 554-55 (8th Cir. 1980).

No. 84-676

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FRANK E. BARNETT,

Petitioner,

v.

UNITED AIR LINES, INC., AND
ASSOCIATION OF FLIGHT ATTENDANTS,

Respondents.

IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF UNITED AIR LINES, INC.

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14 pp

QUESTIONS PRESENTED

1. Whether *Del Costello* v. *International Brotherhood of Teamsters*, ____ U.S. ____, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983) applies retroactively?

2. Whether the six month statute of limitations for unfair labor practices found at 29 U.S.C. § 160(b) should apply to hybrid breach of contract/duty of fair representation cases brought by employees covered by the Railway Labor Act. (45 U.S.C. § 151 *et seq.*) as it applies to employees covered by the Labor Management Relations Act (29 U.S.C. § 141 *et seq.*)?

3. Whether it is appropriate for this Court to review the meaning of the term "accrual" under 45 U.S.C. § 153 (First (r))?

PARTIES TO THE PROCEEDINGS

(a) Plaintiff-Petitioner Frank Barnett until his resignation in July, 1984 was employed by United Air Lines, Inc. as a flight attendant. He was appellant below.

(b) Respondent-Defendant United Air Lines, Inc. (hereinafter referred to as "United") is a Delaware corporation with its principal place of business at 1200 East Algonquin Road, Elk Grove Township, Illinois. It is a wholly owned subsidiary of UAL, Inc., a Delaware corporation, with its principal place of business at the same address. It was appellee below.

(c) Respondent-Defendant Association of Flight Attendants (hereinafter referred to as "AFA") is, and at all pertinent times has been, the collective bargaining agent for United's flight attendants. It was appellee below.

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IN THE

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FRANK E. BARNETT,

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UNITED AIR LINES, INC., AND
ASSOCIATION OF FLIGHT ATTENDANTS,

Respondents.

IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF UNITED AIR LINES, INC.

United Air Lines, Inc. opposes Petitioner Frank E. Barnett's Petition for Certiorari to the United States Court of Appeals for the Tenth Circuit.

JURISDICTION

This case arises under federal law. (See the Railway Labor Act, 45 U.S.C. § 151 *et seq.*) Petitioner's second Petition for Rehearing was denied July 10, 1984. He filed the instant Petition on October 9, 1984. United received a copy of said Petition on October 12, 1984.

STATEMENT OF MATERIAL FACTS

Petitioner, a United flight attendant, was temporarily employed as an inflight services supervisor. Following his temporary duty he returned to his former job of flight attendant. Flight attendants are covered by a collective bargaining agreement between United and respondent Association of Flight Attendants. (Hereinafter referred to as "AFA") Upon his return to the flight attendant job, United adjusted his seniority in such a way that he lost approximately nine months flight attendant seniority credit. He initiated grievance and arbitration procedures pursuant to the collective bargaining agreement. United claimed the seniority adjustment was required by the collective bargaining agreement. On September 7, 1978, the United/AFA System Board of Adjustment upheld United's position and denied petitioner's grievance. Petitioner was first notified of the System Board decision by letter dated October 13, 1978, "which was received several days later." (Amended Complaint) Petitioner's lawsuit was filed October 14, 1980. It alleges that United breached the collective bargaining agreement in adjusting his seniority and that the union did not fairly represent him.

REASONS WHY THIS CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

1. There Is No Conflict In The Circuits That *Del Costello* Should Be Applied Retroactively

This Court's decision in *Del Costello, supra,* borrowed the six month statute of limitations found at 29 U.S.C. § 160(b), for hybrid breach of contract/duty of fair representation cases such as this one. Petitioner asserts that his Petition should be granted because of a purported post-*Del Costello* conflict in the circuits on its retroactivity. However, every Court of Appeals that has considered the matter, except the Ninth, has unam-

biguously found that *Del Costello* should be given retroactive effect.[1] Indeed, *Del Costello* itself does not hint that this should not be the case.

Only the Ninth Circuit refuses to apply *Del Costello* retroactively. *Barina* v. *Gulf-Trading and Transportation Co.*, 726 F.2d 560 (9th Cir. 1984). See also *Singer* v. *Flying Tiger Lines*, 652 F.2d 1349 (9th Cir. 1981). The Ninth Circuit in large part bases this refusal on the first criterion for retroactive application of law stated in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106, 92 S.Ct. 349, 30 L.Ed. 296 (1971). That criterion basically states that under some circumstances a decision will not be given retroactive effect if it establishes a new principle of law, overrules clear past precedent, and was not clearly foreshadowed. The Ninth Circuit refused to retroactively apply *Del Costello* because in *Price* v. *Southern Pacific Transportation Co.*, 586 F.2d 750, 752-759 (9th Cir. 1984) it had ruled that breach of contract/duty of fair representation cases in California were governed by a four year statute of limitations. See *Singer* v. *Flying Tiger Lines, supra* at 1357. It found that in view of this "clear precedent," it would be unfair to apply retroactively *Del Costello*, or its predecessor *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed. 732 (1981).

Thus, the Ninth Circuit does not really conflict with other circuits on this issue. Furthermore, petitioner has not pointed to

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[1] *Graves* v. *Smith's Transfer Corp.*, 736 F.2d 819 (1st Cir. 1984); *Welyczko* v. *U.S. Air Inc.*, 733 F.2d 239 (2d Cir. 1984); *Perez* v. *Dana Corp.*, 718 F.2d 581 (3rd Cir. 1983); *Murray* v. *Branch Motor Express Co.*, 723 F.2d 1146 (4th Cir. 1983); *Edwards* v. *Sea-Land Service Inc.*, 720 F.2d 857 (5th Cir. 1983); *Storck* v. *International Association of Teamsters, Local No. 600*, 712 F.2d 1194 (7th Cir. 1983); *Lincoln* v. *District 9 of the International Association of Machinists and Aerospace Workers*, 723 F.2d 627 (8th Cir. 1983); *Hand* v. *International Chemical Workers Union*, 712 F.2d 1350 (11th Cir. 1983).

precedent like *Price* in the Tenth or any other circuit. To the extent one might conclude a conflict does exist, the Ninth Circuit position has correctly been disregarded by the other circuits. Thus, petitioner here just has not shown sufficient reasons for *certiorari* to be granted on the retroactively issue. Furthermore, *certiorari* should not be granted since a decision by this Court in late 1985 or 1986, as would be expected, would impact few pending cases and fewer still cases not yet brought. This is true since *UPS* v. *Mitchell, supra,* which approved short statutes of limitations as to employer-defendants in most states was decided in 1981 and *Del Costello* was decided in mid-1983.

2. There Is No Conflict In The Circuits That 29 U.S.C. § 160(b) As Discussed In *Del Costello* Should Be Applied To Cases Involving Employees Covered By The Railway Labor Act

Four Circuit Courts of Appeals in addition to the Tenth Circuit have considered whether *Del Costello* requires that hybrid breach of contract/duty of fair representation cases should be regulated by the six month statute of limitations contained in 29 U.S.C. 160(b).[2] All have decided that it should be. Furthermore, though numerous district courts have decided the issue, counsel has found only one district court decision that has held to the contrary.[3]

Furthermore, as in the instant matter, there is good reason that *Del Costello* should be applied to Railway Labor Act cases. The hybrid Railway Labor Act case is virtually identical to the hybrid case arising under § 301 of the National Labor Rela-

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[2] *Linder* v. *Berge,* 739 F.2d 686 (1st Cir. 1984); *Welyczko* v. *U.S. Air,* 733 F.2d 239 (2d Cir. 1984) *Sisco* v. *Consolidated Rail Corporation,* 732 F.2d 1188 (3rd Cir. 1984); *Barina* v. *Gulf-Trading & Transport Co., supra.*

[3] That decision relied upon the *Barnett* opinion withdrawn by the Tenth Circuit. *Henry* v. *Airline Pilots Association,* 585 F.Supp. 376 (N.D. Georgia 1984).

tions Act (29 U.S.C. 185).[4] This Court in *Del Costello* in part applied § 10(b) because of the policies of balancing the national need for finality of collective bargaining settlements with the employee's interest in setting aside unjust settlements. *United Parcel Service* v. *Mitchell, supra,* at 70-71. (Justice Stewart concurring). See *Del Costello, supra* 103 S.Ct. at 2294. This Court held these important policies were promoted by uniform national procedures and limitations that quickly resolved disputes yet allowed employees sufficient time to act. *Del Costello, supra* at 2292, 2294. Those policies are identical in the Railway Labor Act context.

Petitioner's suggestion that conflicts will arise over application of § 10(b) to hybrid cases involving employees covered by the RLA is simply speculation with no logical support. Any court which applies the unequivocal findings of *Del Costello* will apply § 10(b). This is because, if for no other reason, the Court found that hybrid cases *are not* analogous to actions to vacate arbitration awards. Therefore, the two year limitations period in the RLA (45 U.S.C. § 153 (First (r)) applicable to actions to vacate arbitration awards concerning railroad employees only[5] offers a limitations period markedly inferior to § 10(b) of the NLRA.

Therefore, in view of the lack of ambiguity in *Del Costello* and the consistent application to date of that case by the lower courts, further review by this Court would serve no purpose.

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[4] Indeed the duty of fair representation doctrine is a judicially created doctrine which originated under the Railway Labor Act. *Steele* v. *Louisville & Nashville Rail Co.,* 323 U.S. 192, 65 S.Ct. 226 (1944) and later was applied to cases arising under the NLRA. *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 73 S.Ct. 681 (1953).

[5] § 153 is specifically inapplicable to airline employees in any event. 45 U.S.C. § 181.

3. This Court Need Not Consider Whether Petitioner Filed His Suit Within Two Years Of "Accrual" As Used in 45 U.S.C. § 153 (First (r))

In the first *Barnett* opinion withdrawn by the Tenth Circuit, the Court found that petitioner has not filed his suit within two years of "accrual" under 45 U.S.C. § 153 (First (r)). The issue was not ruled upon in the second *Barnett* opinion for which petitioner here seeks review. Therefore, the issue is not properly before this Court now.

CONCLUSION

For the foregoing reasons the Tenth Circuit properly and consistently applied a six month statute of limitations as required by *Del Costello, supra.* The writ of *certiorari* should not be granted.

Respectfully submitted,

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